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No. 82-1057

In the Supreme Court of the United States

OCTOBER TERM, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, ET AL., PETITIONERS

v.

BURLINGTON NORTHERN INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

HENRI F. RUSH
Associate General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the court of appeals correctly concluded that principles of res judicata preclude petitioners from further litigating the question whether Burlington Northern violated an order of the Interstate Commerce Commission.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1982. The petition for a writ of certiorari was filed on December 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1981, the directors of Burlington Northern Inc., then a rail common carrier, decided to restructure Burlington Northern by transferring ownership of the railroad to a newly formed holding company. This restructuring was intended to provide Burlington Northern with greater flexibility in developing its considerable nontransportation assets, because the holding company, as a non-

carrier, could issue securities without first obtaining the approval of the Interstate Commerce Commission. Petitioners, several labor unions representing Burlington Northern employees, challenged the restructuring before both the Interstate Commerce Commission and the United States District Court for the District of Minnesota.

a. *The Commission proceedings* - Petitioners argued before the Commission that the proposed restructuring violated: (1) the Interstate Commerce Act; (2) the Commission's previous order authorizing the merger of the Burlington Northern with the St. Louis-San Francisco Railway Company (the "Frisco Merger Order")[1]; and (3) restrictions contained in certain bonds issued in 1896 by Burlington Northern's corporate predecessors. In June 1981, the Commission rejected petitioners' arguments, concluding that the Burlington Northern restructuring did not violate the Interstate Commerce Act or the Frisco Merger Order. The Commission also concluded that petitioners lacked standing to challenge the restructuring on the basis of the bond restrictions.

Petitioners sought judicial review of the Commission's order. In *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982) ("*BRAC I*"), the court of appeals affirmed the Commission's decision in virtually every respect.[2] The court specifically affirmed the Commission's conclusion that the Burlington Northern restructuring did not violate the Frisco

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[1] *Burlington Northern Inc.—Control & Merger—St. Louis-San Francisco Ry.*, 360 I.C.C. 783, aff'd, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981).

[2] The court remanded to the Commission for further proceedings on the narrow question whether Burlington Northern actually controlled several terminal and switching railroads at the time the holding company was formed. 671 F.2d at 1090-1091. The Commission recently decided that question. *Burlington Northern Inc.—Control & Merger—St. Louis San Francisco Ry.*, 366 I.C.C. 862 (1983). That decision does not affect the questions raised in this petition.

Merger Order. 671 F.2d at 1088. Petitioners did not seek review by this Court of the *BRAC I* decision.

b. *The district court proceedings* - At the same time petitioners were seeking relief from the Commission, they also sought an injunction against the holding company transaction in the district court. As in the Commission proceedings, petitioners argued that the Burlington Northern restructuring would violate both the Interstate Commerce Act and the Frisco Merger Order. The district court denied petitioners' motion for preliminary injunction in *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 513 F. Supp. 1023 (D. Minn. 1981) ("*BRAC II*") (Pet. App. A-1 to A-10), on the grounds that it lacked jurisdiction to consider the alleged violations of the Interstate Commerce Act and that petitioners had not met the requirements for injunctive relief based on alleged violations of the Frisco Merger Order.[3]

Petitioners appealed the denial of their motion for preliminary injunction. The court of appeals dismissed the appeal on the ground that it lacked subject matter jurisdiction. *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (8th Cir. 1981) ("*BRAC III*") (Pet. App. A-11 to A-12). The court of appeals relied on *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853, 857, 860 (8th Cir. 1975), in which it had held that the doctrine of primary jurisdiction normally requires that an agency determine in the first instance whether its own order has been carried out, with subsequent judicial review by (what would then have been) a three-judge district

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[3]On May 14, 1981, following the district court's denial of a preliminary injunction, the holding company transaction was approved by Burlington Northern stockholders and was consummated. See Burlington Northern Brief in Opposition at 2 n.1.

court.[4] As in the case of the *BRAC I* decision, petitioners did not seek review by this Court.

c. *Petitioners' attempt to reinstate the district court proceedings* - Following dismissal of the appeal, the district court dismissed petitioners' action (Pet. App. A-13). Several months later petitioners moved to vacate dismissal of their action on the grounds that it operated to cut off discovery, that it deprived petitioners of the opportunity to amend their complaint to allege a new claim that formation of the holding company violated the Land Grant Act of 1864, ch. 217, 13 Stat. 365, and that it prevented petitioners from reasserting their earlier claims. The district court denied petitioners' request (Pet. App. A-13 to A-14), on the ground that their arguments essentially constituted a claim that the court of appeals had erred in *BRAC III*, and that the district court could not entertain such a claim.

Petitioners again appealed, arguing that the district court had jurisdiction to enforce the Commission's Frisco Merger Order and that it erred in refusing to allow petitioners to amend their complaint to add the new Land Grant Act claim. In a per curiam order (Pet. App. A-15 to A-16), the court of appeals affirmed, holding that the district court did not abuse its discretion when it denied petitioners' request to amend their complaint. The court of appeals also held that principles of res judicata precluded petitioners from continuing to litigate the question of Burlington Northern's compliance with the Frisco Merger Order and that, in any event, that question had been decided correctly in previous decisions.

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[4]At the time *Augspurger* was decided in 1975, ICC orders were reviewed by three-judge district courts pursuant to 28 U.S.C. 2321 *et seq.* The courts of appeals now have exclusive jurisdiction to review Commission orders. See Pub. L. No. 93-584, 88 Stat. 1917.

Petitioners seek review of this most recent order of the court of appeals.

ARGUMENT

Petitioners seek review of a per curiam order (Pet. App. A-15 to A-16) in which the court of appeals held (1) that the district court had not abused its discretion in refusing to allow petitioners to amend their complaint to include a claim based on the Land Grant Act of 1864, ch. 217, 13 Stat. 365, following the entry of judgment against them; and (2) that petitioners' challenge based on an alleged violation of the Frisco Merger Order was barred by principles of res judicata. Petitioners apparently do not challenge the portion of the order upholding the district court's refusal to permit amendment of the complaint. However, they contend vigorously that the district court had jurisdiction to entertain their claim that formation of the holding company violated the Frisco Merger Order and that the court of appeals should not have found that principles of res judicata barred their arguments.[5] Petitioners' contentions do not warrant review by this Court.

The court of appeals correctly held that petitioners' challenge to the formation of the holding company based on an alleged violation of the Frisco Merger Order was barred by principles of res judicata. The court of appeals held at an earlier stage of this case (*BRAC III*; Pet. App. A-11 to A-12)

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[5] As the basis for their argument that formation of the holding company violates the Frisco Merger Order, petitioners cite a paragraph from Table D-7 (expenditures for additions and betterments) of Appendix D to that Order. The paragraph states (360 I.C.C. at 993):

> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations.

that it lacked jurisdiction to consider petitioners' challenges to formation of the holding company, citing well established principles of primary jurisdiction. Petitioners did not seek review by this Court of the decision in *BRAC III*, but instead attempted to revive their challenges in the district court after the action had been dismissed. In the separate appeal from the decision of the Interstate Commerce Commission, the court of appeals rejected the merits of petitioners' claim (*BRAC I*). Again, petitioners failed to seek review of the court of appeals' holding. Thus, petitioners have had a full and fair opportunity to litigate both the issue of jurisdiction and the merits of their claim, and both the Commission and the courts have squarely addressed the various arguments. In each case petitioners chose not to seek review by this Court. The court of appeals correctly held that petitioners had no right to relitigate these issues. See, *e.g.*, *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398-402 (1981).

Petitioners suggest (Pet. 14-15) that their arguments are supported by the proposition that this Court will examine all earlier court decisions once a matter reaches it. But the cases they cite involved the failure to seek immediate review of interlocutory orders that contemplated further actions on remand, such as a new trial. See, *e.g.*, *Mercer* v. *Theriot*, 377 U.S. 152 (1964) (remand with possibility of submission of additional evidence and a new trial); *Stinson* v. *Atlantic Coast Line R.R.*, 355 U.S. 62 (1957) (remand for new trial). The cases do not suggest that a party may fail to petition for a writ of certiorari following a court of appeals judgment that finally disposes of a case, attempt to revive the same issues in the district court, and then seek certiorari on those issues after the court of appeals refuses to reconsider them. Nor do the cases suggest that a party may fail to petition for

a writ of certiorari in one action and then challenge that decision in a petition for review of a related, but separate, decision. Thus, the cases petitioners cite provide no precedent for their contentions here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

HENRI F. RUSH
Associate General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

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[6]Even if there were merit to petitioners' claim that the district court had jurisdiction to consider their challenge to the formation of the holding company and that claim were not barred by res judicata, review by this Court would not be warranted. The Commission concluded that formation of the holding company did not violate the paragraph from Table D-7 of the appendix to the Frisco Merger Order. See pages 2, 5 note 5, *supra*. As the court of appeals correctly noted (671 F.2d at 1088), great weight should be given to an agency's interpretation of its own orders, particularly when the order on its face supports that interpretation. See also Pet. App. A-9 to A-10, in which the district court expressed doubts about the strength of petitioners' claim on the merits without deciding whether or not it had jurisdiction of that claim.